325600

STATE OF MICHIGAN

IN THE 14TH CIRCUIT COURT
FOR THE COUNTY OF MUSKEGON

* * *

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff File #14-64458-FC

V

DEREK JAMES RAINBOLT,

Defendant.

MOTION TO SUPPRESS

BEFORE THE HONORABLE WILLIAM C. MARIETTI,

Muskegon, Michigan, on Wednesday, September 29, 2014.

APPEARANCES:

For the Plaintiff: Christina E. Johnson

For the Defendant: Paula Baker

CALENDARED

NANCY A. WATERS
MUSKEGON COUNTY CLERK
FILED
2015 FEB 13 P 2:52

Transcribed by: MILLS COURT REPORTING
1615 Sunset
N Muskegon, MI 49445
231-744-6823
BOBBIE SPRINGER, CER-3408

RECEIVED
SEP 16 2015
COURT OF APPEALS
THIRD DISTRICT

(Videotape, 09-29-14; 3:58:13)

INDEX

(Videotape, 09-29-14; 3:58:13)

THE COURT: This is People versus Rainbolt, file number 14-64458. The Court has before it a motion to suppress a statement given by the Defendant with regard to an encounter he had with the alleged victim in this case. I believe it was four years prior to the alleged conduct that gave rise to the Information in this case. The contention of the defense, as I understand it, is it's irrelevant and the Plaintiff has responded with a 404(B) notice and a response that it is, indeed, relevant and not outweighed by any prejudice, so Ms. Baker, it's your motion. If you'd like to comment, you may.

MS. BAKER: Yes, your Honor, I would just note that we received the notice regarding the 404(B) in 768.27 on Friday. I didn't reali -- at least I think that's what the proof of service indicates. I object to the inclusion of the polygraph as an exhibit to these particular motions or the notices that was filed by the People. I think that is not admissible under any circumstance, not even as some attachment to a notice that does not complain -- contain any statement by my client outside of the polygraph results, and the polygraph results in this particular case could have been removed from the documents that were submitted and I think that it was selectively added in, and I would move that it be stricken from the Court documents as well.

(Videotape, 09-29-14; 3:58:13)

Additionally, I would note that most of the issues are addressed in our brief, even though there was no notice regarding the 404(B) or 768.27, and I think that we anticipated there might be something like that filed in our analysis. Mr. Oatmen from our office did write that brief, and I think he points out quite well the status of the law in this way and especially the application of *Watkins* to this type of evidence. I would, again, also point out that description of an act involving the same victim and my client involves an accidental or an incidental touching by the victim of him after he had been woken up and I think any reference to the erection disregards the idea that an erection is a largely involuntary response under the circumstances, does not show that he had a sexual interest in the complainant. Furthermore, it's more similar in the description that the People's Exhibit A attached to their brief, *People v Novak,* where the court found that there was insufficient similarity between the 404(B) acts and the charged act because the charged act involved penetration and the 404(B) acts involved no penetration or any attempt at penetration. So I think that that could be pers -- as persuasive eviden -- or persuasive authority to further preclude this particular statement by my client regarding this interaction with his daughter.

(Videotape, 09-29-14; 3:58:13)

THE COURT: Which case was that that you just --

MS. BAKER: That's *People v Novak* that the People supplied with their brief.

THE COURT: Oh, okay, yeah. The *Novak*, the one that was attached to the --

MS. BAKER: Correct. Now they do say that the sex manual could come in because it showed that that defendant had an interest in sex with minors, but it did further say that the acts involving his granddaughters that they were proposing -- or that they did introduce at trial did not involve sexual penetration so it was dissimilar to the acts that were involved in the case charged. So I think that we have a very similar fact pattern with respect to that.

Again, I -- the offer is that evidence is to show intent. I don't think that you can take an accidental touching and change it -- an accidental or an incidental touching by the victim of my client and show that it's his intent to have sex or sexual intercourse with this victim, so I think that that's a -- that is not proper purpose. Furthermore, there's no scheme, plan, or system in doing this act in that this is something that occurred approximately four years before this incident, three or four years before the incident that's alleged in the Complaint because she testified at the prelim that

that happened in 2002. His statement was that about four years before 2013 this incident with the victim occurred. So I think that the -- there's no common scheme, plan, or system shown here. Additionally it's not penetration from the 2009 incident. Furthermore, I don't think it shows motive or opportunity. Motive is an -- is the inducement --

THE COURT: Well, that's what they're claiming.

MS. BAKER: Right.

THE COURT: That's -- I think that's the big -- big thrust of the -- I don't want to steal your thunder. The People's position is this is evidence of motive, that he was somehow -- he was sexually attracted to his daughter and, therefore, when he got the opportunity to fulfill his sexual attraction he took it; right?

MS. JOHNSON: Yes.

THE COURT: Go ahead.

MS. BAKER: Well, your Honor, I don't think that this particular act shows that and I think that it's -- I mean the motive is an inducement to -- or for doing some act as the case law has established. I think that it's quite a leap to go from a 2009 accidental and incidental contact to say that three or four years later he did this when there's not a proximal, temporal relationship between these two acts. It's not like he only had contact with

her during those two incidents so that the next time he had ti -- he had an opportunity he did it? It just is beyond quite belief, your Honor, to say that he waited for three or four years to act on that particular, I guess, emotion. I don't know I can state exactly what that -- what that would be. And I would also point out that there is no other evidence of this act other than his statement regarding it. There's no other witnesses. Not even the victim indicates that this occurred. So I think there's --

THE COURT: You mean that -- wait a minute. When you say not the victim, you mean she denies that occurred? I didn't --

MS. BAKER: She was asked if there was any other sexual contact with him and she said no. I would also -- I think that there's some differences of opinion about the specific language that is used during Mr. --

THE COURT: Was this at the prelim?

MS. BAKER: Her testimony.

THE COURT: Was this at the prelim where she said there was no other sexual contact?

MS. BAKER: No, I believe that was at the -- when she was interviewed by Child Protective Services.

THE COURT: Oh, okay. Go ahead.

MS. BAKER: Okay. I think there's an indication

in the People's brief that the victim said that she straddled him and that he indicated that during his statement, but I made my notes, this was a recorded interview of my client. I reviewed that particular recording and never wrote down straddled, and I'm -- if there's a word that sticks out in my mind I will write it down. And that -- he did not say that she straddled him at any point, so I think it's a difference of opinion about the language that was being using, and there I'm not saying that they're trying to mislead, but I want to say that the language that he used was she jumped on him and as soon as the beh -- you know, as soon as these things happened he tried to get away from it, so it's not like he was trying to engage with this young girl at that time when -- in 2009. He was trying to get away and she grabbed at his pants and she may have touched his penis when he was trying to get away. He's not saying that he was engaging with her in this behavior. So I just want to point out that that's also a distinction.

But I think that in the brief Mr. Oatmen points out all of the factors that *Watkins* indicates is important. Furthermore, *Watkins* does say that the prior act here is not admissible under 768.27(A), so the propensity inference weighs against admissibility as indicated in *Watkins*. It's on page 6 of our brief. So I

think that all of the *Watkins* favor weigh heavily against admissibility under these circumstances, and I think that it -- there's some inference being presented by the People that the 402 and 403 don't apply when you're trying to admit evidence under 768.27 and I think that that is a mischaracterization. We would have heard news if MR -- if Michigan Rules of Evidence 403 does not apply to evidence admitted under 768.27. It still has to go through the relevancy test and, furthermore, it can't be more prejudicial than probative. Based on the nature of the statement, I think that the potential for the jury to convict my client just based on that statement, even though this victim has a history of lying and has a number of credibility issues, I think that that prejudicial --

MS. JOHNSON: I object to that. That's not evidence before the Court in this hearing, the victim's credibility.

THE COURT: What's that? What did you say that I didn't --

MS. BAKER: I said this victim has some issues with her credibility, your Honor.

THE COURT: Oh, okay. Well, I agree.

MS. BAKER: But I think that there is a high chance --

THE COURT: Wait a minute. I want to make sure

the record's clear. I don't agree that she has issues with credibility. I agree with your objection. Okay, go ahead.

MS. BAKER: That there -- with the admission of the statement the prejudicial value -- or prejudicial nature of it is so high that it would eliminate the Court -- or the jury from considering the facts as presented to them during the trial, so I'd ask that the Court exclude that statement from being presented to them.

THE COURT: All right. Well, as I always have to go through in the 404(B) issue, whenever you contend that it's not relevant to any issue in the case, what is the defense, just a general denial, it didn't happen?

MS. BAKER: Yes. He denies that it happened, your Honor.

THE COURT: Okay. So it's a general denial. All right. Go ahead, Ms. Johnson.

MS. JOHNSON: Your Honor, we did file a 404(B) and 768 notice. However, that's not the crux of my argument before the Court today.

THE COURT: I understand.

MS. JOHNSON: This is admissible as a statement by a party opponent and as relevant evidence. The only way that relevant evidence is ever curbed by the statute is under 403 when it's more probati -- when this probative

value is substantially outweighed by the potential prejudice. This is clearly relevant. It's relevant to his motive. This is by the Defendant's own statement to the police he sees it as very similar to the act that has been charged against him. We're talking about -- and I do want to correct the timeline that we've been talking about. The polygraph and this statement was taken in November of 2013, which would mean that this act that the Defendant talks about was sometime between -- around November 2009 and the crime that we're alleging in the 2011-2012 school years, so it could have been less than two years between the time the Defendant --

THE COURT: So it was somewhere between two and three years?

MS. JOHNSON: Two and three, yes.

THE COURT: Yeah. Okay. Do you agree with that, Ms. Baker?

MS. BAKER: In a general sense. I would say it's more like three years.

THE COURT: Okay. Well, between two and three. Okay. I'm gonna -- all right, go ahead.

MS. JOHNSON: It goes -- it's relevant because it goes directly to his motive and state of mind. Motive is defined as case law by an inducement for doing some act, something that gives birth to the purpose, and what we

have here is a statement that his daughter was on him, bouncing up and down on him, rubbing her genitalia on him, her breasts became exposed and he got an erection, sexual arousal. Now it may not have been the very next time he saw her, but when he has his opportunity and had her alone in his shop he acted on that. Not only the same victim but that exact same sexual position is what he did, and in the *Watson* case this court does allow in a picture of a girl's behind that was the victim of a sex -- of a CSC case and they specifically held that it was not coming in to show that the defendant was a sexual pervert but his exact sexual interest in that victim.

We have more than that here because we have not just his sexual interest in our victim in this case, but also his sexual interest in that exact sexual act in that exact sexual position with her. The crime that the victim has described in the preliminary exam and in the police reports and that we intend to prove at trial is that the Defendant pulled her down on top of him and penetrated her from below, the same sexual position as he experienced when she was bouncing on him and aroused him previously.

The defense in their motion, and I haven't heard anything different today, indicate that the only -- that the potential prejudice is a double inference of a propensity, that he acted badly once and so he must have

done this again. I don't think any prosecutor could stand up with a straight face and tell the jury he acted badly once based on his statement alone. His statement is that he became aroused and he pushed this girl off of him to avoid that sexual contact, to avoid anything.

MS. BAKER: Your Honor, I have to object at this point. I recognize this is her argument, but when I listened to the recorded interview, Mr. Rainbolt does not indicate that he became aroused during this incident.

MS. JOHNSON: I'm sorry. He had an erection while she was bouncing on him.

MS. BAKER: He also indicated he had just woken up.

MS. JOHNSON: Whether the arousal comes from his sleep or from the victim I would say is a question for the jury. But we can't introduce that as propensity evidence, and I think it's a giant leap to say that a jury would think it's propensity evidence. When the jury hears that, they're going to hear only his version of the events because that is the only version we have. The victim was asked if there was anything sexual before. She had no way of knowing that he saw that sexually. If she didn't know he had an erection, she only knows of that experience that she was trying to get him out of bed, she was bouncing around, and he pushed her off and told her to stop.

That's not something that she necessarily knew about and so it's not surprising that it didn't come out when she was asked about prior sexual contact with him.

Again, it is relevant. The only way that relevant evidence is kept out is for its potential prejudicial value to substantially outweigh it, and there is just no substantial danger of an unfair prejudice in this case because the Defendant did exactly what he should have done in pushing her off of him, and this goes specifically to his motive, not to any propensity.

THE COURT: Okay. Anything further you want to say, Ms. Baker?

MS. BAKER: Well, I just need to make a quick statement. If he did the right thing back in 2009, then he shouldn't -- it shouldn't be used in this particular case to show that he did this particular offense. If that's their theory, that he did the right thing back in 2009, then that is not relevant to his motive or intent in this particular case because he did the right thing back then.

THE COURT: Okay, thank you, ladies. I will consider this matter and give you a written opinion.

MS. JOHNSON: Your Honor, while we're here, there is a motion to add witnesses that was filed on May 28th that was never heard by the Court. I did -- in the span

of time where this has been adjourned I did have time to do a memo to add witnesses; however, I failed to add all of the witnesses, so I'm renewing my motion to add Jennifer Houston and Timothy Houston as witnesses that was filed on May 28th.

THE COURT: Okay. We're set for trial October --

MS. JOHNSON: A week from tomorrow.

THE COURT: A week from tomorrow, okay. Anything you want to say about those witnesses, Ms. Baker?

MS. BAKER: Well, my notice shows Jennifer and Timothy Houston on the August 1st, 2014 witness list.

MS. JOHNSON: Okay.

MS. BAKER: So I -- I'd --

THE COURT: So the motion is not necessary?

MS. JOHNSON: It's withdrawn then.

THE COURT: Okay. Okay, thank you, ladies.

(Court adjourned at 4:17:28.)

-oOo-

(Videotape, 09-29-14; 3:58:13)

STATE OF MICHIGAN)

) SS

COUNTY OF MUSKEGON)

I, certify that this transcript, consisting of 16 pages is a complete, true, and correct transcript of the videotaped proceedings and testimony taken in PEOPLE V RAINBOLT, 14-64458-FC on September 29, 2014, Videotaped.

***Please note proper names and/or case names unknown to this reporter are spelled phonetically and may not be correct.*

Bobbie Springer

Bobbie Springer

Certified Court Recorder 3408